

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHAEL GORMAN,

Appellant,

v.

UNIVERSITY OF WASHINGTON,

Respondent.

) Case No. DISM-02-0014

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair. The hearing was held at the University of Washington, South Campus Center, Seattle, Washington, on February 13, 2003. GERALD L. MORGEN, Vice Chair, reviewed the file and record and participated in the decision in this matter.

1.2 **Appearances.** Appellant Michael Gorman was present and was represented by John Scannell, Attorney at Law. Jeffrey W. Davis, Assistant Attorney General, represented Respondent University of Washington.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for Appellant's use of the word "niggering" in the workplace.

1.4 Citations Discussed. WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

## II. FINDINGS OF FACT

2.1 Appellant Michael Gorman was a Heavy Equipment Operator and permanent employee of Respondent University of Washington. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on February 15, 2002.

2.2 Appellant became employed with the University of Washington Facilities Services department on August 9, 1999. As a Heavy Equipment Operator, Appellant was in a journey-level position operating heavy-duty trucks and other equipment.

2.3 At the time of his employment, Appellant attended a new employee orientation and was made aware of the Facilities Services' and the Department of Maintenance and Alterations' rules and regulations. Appellant also received a copy of the Facilities Services Department Employee Information booklet that contained a copy of the Non-Discrimination and Harassment policy. The policy states:

### NON-DISCRIMINATION

The University of Washington is an equal opportunity and affirmative action employer. This means that the University, as a standing policy, does not discriminate on the basis of race, color, creed, religion, national origin, sex, sexual orientation, age, marital status, disability, or status as a disabled veteran or Vietnam war veteran. Any discriminatory action is prohibited by law and University policy, and can be cause for disciplinary action. ...

## HARASSMENT

Facilities Services will not tolerate harassment of any employee by any other employee, regardless of the position the employee holds. Harassment on the basis of race, sex, age, national origin, sexual orientation, disability, religion, veteran status, color, creed, or marital status is a form of discrimination and as such is a violation of state and federal law and/or University of Washington and department policy.

Harassment includes verbal or physical conduct designed to threaten, intimidate, coerce or demean, and may impair employees' ability to do their job. Harassment may take many forms such as:

- hostile, threatening or intimidating actions, gestures, or physically interfering with normal work or movement;
- slurs;
- taunting;
- verbal abuse or epithets;
- degrading comments or jokes.

....

It is inappropriate and unacceptable for any employee to engage in any remarks, gestures, or conduct that can be considered harassment. Any employee of this organization who is found to have engaged in conduct that constitutes harassment is subject to disciplinary actions, up to and including immediate dismissal.

(emphasis added)

2.4 The Facilities Services Policy and Procedure Manual also has a policy that addresses "Verbal and Physical Abuse In the Workplace." The policy defines verbal abuse as "statements to another which are demeaning, hostile, or confrontational." The policy further reads:

Name calling and threatening statements are included in such behavior. Verbal abuse poisons the work environment, can lead to physical confrontations, and is therefore not acceptable under any circumstances. Friendly conversation involving mutual joking or kidding are acceptable and generally contribute to a pleasant work environment. However, if the recipient of the comments is offended then the remarks cannot be considered good natured kidding or joking. Any employee who engages in verbal abuse ... will be held accountable. Such

behavior will not be excused just because it is claimed that it was done in a “joking” manner.

2.5 The policy further indicates that any employee who verbally abuses another will “normally” receive a written reprimand, but that severe or repeated instances of that type of behavior will result in discipline, including suspension, salary reduction, demotion or dismissal (emphasis added).

2.6 Appellant attended meetings on January 12, 2000 and January 10, 2001 where the policies on harassment, abusive behavior and derogatory language were covered with staff.

2.7 On November 1, 2001, Charles Thompson, Utility Worker 2, was assigned to work with the Grounds and Maintenance crew. Mr. Thompson was responsible for assisting the heavy equipment operators. The heavy equipment operator was considered the lead worker and was responsible for giving direction to the utility workers. Mr. Thompson was assigned to work with Heavy Equipment Operator Bill Dougherty. Mr. Thompson went to the Corporation Yard to prepare for his assignment.

2.8 Appellant was at the Corporation Yard and was engaged in conversation with Bob Murray, a temporary employee. Mr. Murray had been assigned to do some clean up of a maintenance shop and he and Appellant were discussing the job assignment. Mr. Thompson and Mr. Dougherty were within feet of where Appellant and Mr. Murray could overhear the conversation. Appellant stated that he could not understand why Mr. Murray had been assigned such a menial task. Appellant said Mr. Murray should have been assigned a better job for the day so that he wouldn’t “have to be niggering around for Harold.” Appellant was referring to Harold Maus, the employee Mr. Murray was assigned to assist with cleaning duties.

1 2.9 Mr. Thompson, who is African-American, heard Appellant use the term “niggering” and  
2 saw Appellant use a “sweeping” motion to illustrate someone using a broom. Mr. Thompson was  
3 hurt, offended and shocked by Appellant’s use of the word “niggering.” Mr. Dougherty was also  
4 offended by Appellant’s remark. Appellant, Mr. Dougherty and Mr. Murray are Caucasian.

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6 2.11 Mr. Thompson and Mr. Dougherty left the Corporation Yard. Later that morning, Mr.  
7 Thompson and Mr. Dougherty discussed the incident. Appellant expressed betrayal, anger and  
8 disbelief, especially because he and Appellant had worked together in the past and had what he  
9 believed to be a good working relationship.

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11 2.12 Mr. Thompson subsequently reported the incident to Human Resource Consultant Linda  
12 Tennant.

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14 2.13 During the investigation that ensued, Mr. Thompson requested that he not be assigned to  
15 work with Appellant in the future.

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17 2.14 On November 27, 2001, Ken Rogers, Appellant’s supervisor, and Rick Cheney, director of  
18 Facilities Services, interviewed Appellant. Appellant admitted he made the statement.

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20 2.15 On December 21, 2001, Mr. Cheney held a pre-disciplinary meeting with Appellant and  
21 Appellant’s union representative. During the meeting, Appellant submitted a written response to  
22 the charges. Appellant stated his comment was a “slip of the tongue.” He also asked Mr. Cheney to  
23 consider the personal stress he was under at the time, including the illness of his mother. When Mr.  
24 Cheney asked Appellant how he intended to ensure that he would not repeat comments of a  
25 derogatory nature, Appellant stated that he grew up in an environment where similar terms were  
26

1 commonly used and that it would be very difficult for him to ensure or promise that he wouldn't  
2 "accidentally make such a statement in the future."

3  
4 2.16 After considering Appellant's response to the charges, Mr. Cheney decided to recommend  
5 Appellant's termination to the appointing authority. Mr. Cheney did not feel that Appellant  
6 presented any mitigating facts for his use of a racial slur. Mr. Cheney concluded that  
7 recommending termination was appropriate based on Appellant's statement that he could not ensure  
8 that he would not repeat a similar statement in the future. Mr. Cheney also considered that because  
9 the University employs a large and diverse group of employees, Appellant's dismissal would be the  
10 best way to ensure that the workplace was respectful of others.

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12 2.17 By letter dated January 4, 2002, Mr. Cheney submitted his recommendation for Appellant's  
13 dismissal to the appointing authority, Jeraldine McCray, Associate Vice President of the Facilities  
14 Services department.

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16 2.18 By letter dated January 8, 2002, Ms. McCray informed Appellant of his termination  
17 effective January 24, 2002.

### 18 19 **III. ARGUMENTS OF THE PARTIES**

20 3.1 Respondent argues that the "N" word has no place in workplace conversations. Respondent  
21 argues that Appellant used a variant of the word, "niggering," but that the meaning is still derisive  
22 of African-Americans. Respondent asserts that the "N" word puts a person in a box and separates  
23 that person from everybody else as being different because of the color of his/her skin. Respondent  
24 argues that the University cannot have a workforce where demeaning comments occur. Respondent  
25 argues that the University has a diverse work force and that management has taken steps to build  
26 mutual respect and eliminate inappropriate behavior in the workplace. Respondent argues that

1 Appellant's comment was damaging not just to Mr. Thompson, but to the whole work unit.  
2 Respondent argues that termination was the appropriate penalty based both on Appellant's initial  
3 statement and his lack of commitment to change his behavior so that other employees would not be  
4 subjected to inappropriate remarks based on their ethnicity.

5  
6 3.2 Appellant admits that he made a mistake when he made an isolated and offhand remark to  
7 another white employee who was assigned work he believed to be "slacker" work. He argues,  
8 however, that the University's decision to terminate him on the basis of one incident is far too  
9 harsh. Appellant denies that his term was meant to denigrate African-Americans. Appellant argues  
10 that the University's policy fails to put employees on notice that use of this term is forbidden and its  
11 use is automatically considered harassment and violates the policy. Appellant argues that he was  
12 not in a position of power and therefore, could not have verbally abused Mr. Thompson. Appellant  
13 asserts that this is not a case of racial discrimination or harassment but one of censorship.  
14 Appellant argues that the policy is not strictly enforced and that for the University to be consistent  
15 with the policy, it would have to ban in summary fashion a number of literary works that are  
16 required reading at the University.

#### 17 18 **IV. CONCLUSIONS OF LAW**

19 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.  
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21 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
22 the charges upon which the action was initiated by proving by a preponderance of the credible  
23 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
24 sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-  
25 240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).  
26

1 4.3 Respondent's policies are clear that slurs, demeaning and degrading comments, and racial  
2 epithets are not acceptable under any circumstances and will be not tolerated by the University.  
3 Appellant was aware of the standards of conduct expected in the workplace. Respondent has met  
4 its burden of proving by a preponderance of the credible evidence that Appellant violated these  
5 standards when he used a hateful, inflammatory and highly inappropriate term in the workplace.  
6 Racial epithets and negative ethnic stereotypes should not be condoned in the workplace.  
7 Appellant's use of the term "niggering" had a detrimental impact on his working relationship with  
8 Mr. Thompson who was offended by the nature of the remark, as well as Mr. Dougherty, who also  
9 found the term offensive and inappropriate.

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11 4.4 In Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999), we addressed  
12 misconduct of a nature similar to that presented here. In Schley we concluded that the appellant  
13 had made offensive, inappropriate comments that could reasonably be perceived to be racially  
14 motivated and that while appellant was entitled to have his own opinions, it was not appropriate for  
15 him to voice his opinions in the workplace when those opinions could offend others. We further  
16 concluded that the egregious nature of appellant's comments warranted dismissal, that appellant's  
17 admitted comments alone were offensive, inappropriate, and racial in nature, and that such conduct  
18 in the work place should not be tolerated. In Schley, we upheld dismissal of the appellant.

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20 4.5 In determining whether a sanction imposed is appropriate, consideration must be given to  
21 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
22 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
23 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
24 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).



1 4.6 The University has the right to prohibit its employee from using ethnic slurs that are  
2 offensive to coworkers. The University's policy on Verbal and Physical abuse further indicates that  
3 verbal abuse is not acceptable under any circumstances and although an employee who engages in  
4 verbal abuse may receive a written reprimand, a severe instance will result in discipline, up to and  
5 including dismissal. We conclude that use of the word "nigger" or any other term derived from that  
6 word constitutes a severe instance.

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8 4.7 The disciplinary sanction of dismissal was appropriate under the circumstances present here.  
9 The Appointing Authority's decision to dismiss Appellant was not too severe.

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11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Gorman is denied.

13  
14 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

15  
16 WASHINGTON STATE PERSONNEL APPEALS BOARD

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19 Walter T. Hubbard, Chair

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22 Gerald L. Morgen, Vice Chair